



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 12, 2005

Mr. Reagan Greer  
Executive Director  
Texas Lottery Commission  
P. O. Box 16630  
Austin, Texas 78761-6630

OR2005-03099

Dear Mr. Greer:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 221855.

The Texas Lottery Commission (the "commission") received a request for all information regarding the two Set For Life winners. You state that you have released some of the requested information, but claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.130 of the Government Code. Further, you state that the request may implicate third party proprietary interests. Accordingly, you indicate and provide documentation showing that, pursuant to section 552.305 of the Government Code, you notified Scientific Games International ("Scientific Games") of the request for information and of its right to submit arguments explaining why the information concerning it should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that Exhibit B1 is subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Exhibit B1 is a completed report. Therefore, as prescribed by section 552.022, the commission must release Exhibit B1 unless it is confidential under other law. You claim that this information is excepted by section 552.111 of the Government Code. However, section 552.111 is a discretionary exception to public disclosure that protects the governmental body's interests and may be waived. *See Open Records Decision Nos. 677 at 10 (attorney work product privilege may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally).* As such, section 552.111 does not qualify as other law that makes information confidential. Thus, the commission must release Exhibit B1.

You claim that some of the submitted information is excepted from public disclosure under section 552.101 of the Government Code, which protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 466.022(b) of the Government Code provides in pertinent part:

(1) security plans and procedures of the commission designed to ensure the integrity and security of the operation of the lottery; [and]

(2) information of a nature that is designed to ensure the integrity and security of the selection of winning tickets or numbers in the lottery, other than information describing the general procedures for selecting winning tickets or numbers[.]

Gov't Code § 466.022(b)(1)-(2). You state that release of the marked information would "compromise the lottery games and threaten the integrity and security of the lottery." Based on your representations and our review of the information at issue, we conclude that the information you have marked is confidential under section 466.022 of the Government Code; therefore, the commission must withhold this information under section 552.101 of the Government Code.<sup>1</sup>

You also claim that portions of the remaining information are protected under section 552.107 of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *Open Records Decision No. 676 at 6-7 (2002).*

---

<sup>1</sup>Because of your ruling, we need not address Scientific Games' arguments for the same information.

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

In this instance, you state that some of the submitted records are confidential communications between commission attorneys and employees of the commission. You also state that these communications were made in confidence, are intended for the sole use of the commission, and have not been shared or distributed to others. Based on our review of your representations and the submitted information, we find that you have demonstrated the applicability of the attorney-client privilege to the submitted records you marked.<sup>2</sup>

---

<sup>2</sup>We note that as part of the commission's burden of demonstrating the attorney-client privilege, you were required to inform this office of the identities and capacities of the individuals to whom each communication was made. In correspondence to this office, you identified the commission's attorneys only. However, by reviewing all of the submitted information, this office was able to glean the capacities of other individuals involved in the communications. In the future, the commission must identify all parties to the communications or risk that the information will not be protected from disclosure.

Accordingly, the commission may withhold the marked documents under section 552.107 of the Government Code.<sup>3</sup>

You claim that portions of the remaining information, which you have marked, are protected under section 552.111 of the Government Code. Section 552.111 excepts from public disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of this exception is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, and opinions that reflect the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995). Furthermore, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* Open Records Decision No. 615 at 5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982). We note that section 552.111 is applicable to communications that involve a governmental body’s consultants. *See* Open Records Decision Nos. 631 at 2 (1995) (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body’s request and performing task that is within governmental body’s authority), 563 at 5-6 (1990) (private entity engaged in joint project with governmental body may be regarded as its consultant).

The commission states that the marked portions of the submitted information contain the advice, opinions, and recommendations of commission employees and consultants regarding

---

<sup>3</sup>Because of our ruling, we need not address Scientific Games’ arguments for the same information.

“payment of prizes and ticket production.” Having considered your arguments and reviewed the submitted information, we conclude that the commission has established the applicability of the section 552.111 to some of the submitted information. However, we find that portions of the information you seek to withhold are purely factual or do not reflect the internal deliberations of the commission on matters concerning the policy mission of the commission. Accordingly, the commission may only withhold the information we have marked under section 552.111 of the Government Code. The remaining information you have marked may not be withheld under section 552.111 of the Government Code.

You also claim that a Texas-issued driver’s license is excepted under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from required public disclosure if the information relates to:

- (1) a motor vehicle operator’s or driver’s license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Gov’t Code § 552.130. After reviewing the submitted information, we agree that you must withhold the Texas-issued driver’s license you have marked under section 552.130 of the Government Code.

Scientific Games claims that a portion of the remaining information is excepted under section 552.110 of the Government Code, which protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov’t Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov’t Code § 552.110(a). A “trade secret”

may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it

relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury

would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Scientific Games claims that Exhibits B4 and B6 are protected as a trade secret. Upon review of the comments submitted by Scientific Games and the submitted information, we find that Scientific Games has established a *prima facie* case that Exhibit B4 is protected as a trade secret. Moreover, we have received no arguments that would rebut this case as a matter of law. We therefore conclude that the commission must withhold Exhibit B4 pursuant to section 552.110(a) of the Government Code. However, as to Exhibit B6, we determine that Scientific Games has not demonstrated that this information meets the definition for a trade secret. We therefore determine that Exhibit B6 is not excepted from disclosure under section 552.110(a) of the Government Code.

Scientific Games also claims that Exhibit B6 contains commercial information that is excepted from disclosure under section 552.110(b). After reviewing Scientific Games' argument and Exhibit B6, we find that they have not provided specific factual evidence substantiating its claim that the release of this information would result in substantial competitive harm to the company. Accordingly, we determine that Exhibit B6 is not excepted from disclosure under section 552.110(b). *See* Open Records Decision Nos. 661 (1999) (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (1982). Thus, Exhibit B6 may not be withheld under section 552.110(b) of the Government Code.

Scientific Games also claims that Exhibit B5 is excepted pursuant to section 552.139 of the Government Code, which provides as follows:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; and

(2) any other assessment of the extent to which data processing operations, a computer, or a computer program, network, system, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an

assessment of the extent to which the governmental body's or contractor's electronically stored information is vulnerable to alteration, damage, or erasure.

Gov't Code § 552.139. Scientific Games states that Exhibit B5 contains "a point-by-point explanation of how [Scientific Games'] equipment actually processes and prints tickets." Scientific Games also states that withholding Exhibit B5 protects its integrity and prevents against "hacking." However, based on our review of Exhibit B5, we find that it does not contain any information that relates to computer network security or to the design, operation, or defense of a computer network. Further, Exhibit B5 is not a computer network vulnerability report or an assessment of the extent to which the computer network systems of the commission or Scientific Games are vulnerable to unauthorized access or harm. Consequently, we conclude that the commission may not withhold any portion of Exhibit B5 under section 552.139 of the Government Code.

We note that the remaining information contains an account number. Section 552.136 provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. Thus, we have marked the account number that must be withheld pursuant to section 552.136.

In summary, the commission must withhold the information you have marked under section 552.101 of the Government Code in conjunction with 466.022 of the Government Code. We have marked the information that may be withheld under sections 552.107 and 552.111 of the Government Code. The commission must withhold the Texas-issued driver's license under section 552.130 of the Government Code. The commission must withhold Exhibit B4 under section 552.110(a) of the Government Code. The commission



must also withhold the account number pursuant to section 552.136 of the Government Code. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

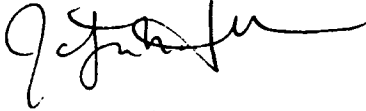
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Thompson', with a long horizontal flourish extending to the right.

Jaclyn N. Thompson  
Assistant Attorney General  
Open Records Division

JNT/krl

Ref: ID# 221855

Enc. Submitted documents

c: Ms. Dawn Nettles  
P. O. Box 495033  
Garland, Texas 75049-5033  
(w/o enclosures)

Albert R. Axe, Jr.  
Jenkins & Gilchrist  
401 Congress Ave., Suite 2500  
Austin, TX 78701-3799